

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, a foreign
insurance company; THE PHOENIX
INSURANCE COMPANY, a foreign
insurance company,

Plaintiffs,

v.

NORTHWEST PIPE COMPANY, a
Washington corporation; and GREATER
VANCOUVER WATER DISTRICT, a
British Columbian statutory corporation,

Defendants.

No.

**COMPLAINT FOR
DECLARATORY RELIEF
(28 U.S.C. § 2201)**

Plaintiffs Travelers Property Casualty Company of America (hereinafter “TPCC”) and
The Phoenix Insurance Company (hereinafter “Phoenix”) (collectively “Travelers”) submit the
following Complaint for Declaratory Relief pursuant to 28 U.S.C. § 2201 and Fed.R.Civ.P. 57.

I. PARTIES

1.1 Plaintiff TPCC is a foreign insurance company licensed to conduct business in the
State of Washington. TPCC is organized under the laws of the State of Connecticut with its

1 principal place of business in the State of Connecticut. TPCC is licensed to transact business in
2 Washington and at all material times has transacted business in Washington.

3 1.2 Plaintiff Phoenix is a foreign insurance company licensed to conduct business in
4 the State of Washington. Phoenix is organized under the laws of the State of Connecticut with
5 its principal place of business in the State of Connecticut. Phoenix is licensed to transact
6 business in Washington and at all material times has transacted business in Washington.

7 1.3 Defendant Northwest Pipe Company (hereinafter “Northwest Pipe”) is a
8 Washington corporation with its principal place of business in the State of Washington.

9 1.4 Defendant Greater Vancouver Water District (hereinafter the “District”) is a
10 statutory corporation organized under the laws of British Columbia.

11 **II. JURISDICTION AND VENUE**

12 2.1 Jurisdiction is properly before this Court pursuant to 28 U.S.C. §1332, *et. seq.*, as
13 complete diversity exists among the parties and the amount in controversy exceeds \$75,000.

14 2.2 The Court has jurisdiction over this declaratory judgment action pursuant to
15 28 U.S.C. § 2201 because there is an actual and justiciable controversy between the parties with
16 respect to the existence of insurance coverage under the policies of insurance issued by Travelers.
17 A judicial determination and declaration of the rights and obligations of the parties is necessary
18 and appropriate at this time because Travelers has no adequate remedy at law which will resolve
19 the current controversy.

20 2.3 Venue is proper in this Court pursuant to 28 U.S.C. § 1391 as this action involves
21 a dispute over the application of insurance coverage under policies written out of Washington,
22 events and omissions which gave rise to this claim occurred in this district, and because
23

Northwest Pipe is subject to this Court's personal jurisdiction.

III. FACTUAL BACKGROUND

3.1 This lawsuit is an insurance coverage dispute arising out of the allegations set forth in the underlying action entitled *Greater Vancouver Water District v. Northwest Pipe Company, et al.*, in the Supreme Court of British Columbia, Vancouver Registry No. S156457 (the "Underlying Lawsuit").

3.2 The subject claim arises from alleged construction defects at a water treatment project in North Vancouver, British Columbia.

3.3 As alleged in the Underlying Lawsuit, the Greater Vancouver Water District (the "District") began the Seymour-Capilano Filtration Project (the "Project") to improve the availability and quality of drinking water. The Project allegedly involved constructing two underground tunnels to convey raw and treated water between two pumping stations in British Columbia. As part of this construction, steel liner was to be installed and grout would be used to fill space surrounding the steel liner. The grout was to be injected through "grout ports" in the steel liner, and the ports were to be sealed with "grout plugs" to prevent water leakage.

3.4 On August 7, 2015, the District filed the Underlying Lawsuit against Northwest Pipe, among others, based on alleged defects with the steel liner and grout plugs.

3.5 The District alleges that it had entered into a supply contract with Northwest Pipe on September 20, 2006, for the manufacture and supply of the steel liner and grout plugs for the Project (the "Supply Contract"). The District alleges that, per the Supply Contract, Northwest Pipe was to ensure that the steel liner and grout plugs conformed to the applicable design, were free from defects, and were fit for their intended purpose, among other warranties.

3.6 The District further alleges that installation of the piping allegedly began on or

1 about August 12, 2013, in British Columbia. The District alleges that during the original
2 installation of the grout plugs, there were multiple failures of the circumferential welds used to
3 seal the grout plugs to the steel liner. The District further alleges that the method for sealing the
4 grout ports had to be redesigned on or about November 14, 2013. The District alleges that this
5 resulted in a delay in the construction of the Project and thereby caused the District to incur
6 damages.

7 3.7 In the underlying Complaint, the District alleges breach of contract and
8 negligence claims against Northwest Pipe. The breach of contract claim is alleged to arise from
9 Northwest Pipe's alleged failure to manufacture grout plugs and steel liner which conformed to
10 design specifications, was free from defects, and was fit for their intended purpose as required
11 by the Supply Contract. The negligence claim arises from Northwest Pipe's alleged failure to
12 exercise the reasonable care of a competent metals fabricator in manufacturing the steel liner and
13 grout plugs in conformity with the standards set forth in the Supply Contract.

14 3.8 In the underlying Complaint, the District does not allege a specific amount of
15 damages. Instead, the District alleges that the underlying defendants' negligence and breaches of
16 contract resulted in delays in constructing the Project, and resulted in additional costs to
17 investigate the cause of the grout plug failures, redesign the method for sealing the grout plugs,
18 and to install, remove and replace the failed grout plugs.

19 3.9 Travelers is currently defending Northwest Pipe in the Underlying Lawsuit under
20 an express reservation of rights.

IV. POLICIES OF INSURANCE

A. Identification of the Subject Insurance Policies

4.1 Travelers issued commercial general liability insurance policies to Northwest Pipe under policy number Y-660-226D0451 for successive one-year policy periods from November 1, 2006 through November 1, 2016 (hereinafter the “Policies”). Specifically, Phoenix was the insurer that issued the policies that were in effect during the policy periods of November 1, 2007 through November 1, 2008, and November 1, 2015 through November 1, 2016. TPCC issued all of the other Policies to Northwest Pipe.

4.2 Each of the Policies has a \$1,000,000 each occurrence limit and a \$2,000,000 aggregate limit, and include the terms, conditions and exclusions set forth below.

B. Provisions of the Subject Policies

4.3 The commercial general liability portion of the Policies contains the following insuring agreement:

SECTION I -COVERAGES COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

(1) The amount we will pay for damages is limited as described in Section III Limits Of

Insurance; and

- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sum or perform acts or services is covered unless explicitly provided for under Supplementary Payments Coverages A and B.

b. This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
- (2) The “bodily injury” or “property damage” occurs during the policy period;
- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

...

d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

- (1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any

other insurer;

(2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or

(3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

...

CG 00 01 10 01, p. 1.

4.4 The Policies contain the following definitions that are applicable to the foregoing Insuring Agreement.

SECTION V – DEFINITIONS

...

13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

...

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

...

18. “Suit” means a civil proceeding in which damages because of “bodily injury”, “property damage” or “personal and advertising injury” to which this insurance applies are alleged. “Suit” includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are

claimed and to which the insured submits
with our consent.

CG 00 01 10 01, pp.14-15, as modified by CG D2 56 11 03.

4.5 The commercial general liability portion of the Policies contain the following
exclusions and applicable definitions:

a. Expected Or Intended Injury

“Bodily injury” or “property damages” expected or intended from
the standpoint of the insured. This exclusion does not apply to
“bodily injury” resulting from the use of reasonable force to protect
persons or property.

CG 00 01 10 01, p. 2.¹

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured
is obligated to pay damages by reason of the assumption
of liability in a contract or agreement. This exclusion does
not apply to liability for damages:

- (1) That the insured would have in the absence of the
contract or agreement; or
- (2) Assumed in a contract or agreement that is an
"insured contract", provided the "bodily injury" or
"property damage" occurs subsequent to the
execution of the contract or agreement. Solely for
the purposes of liability assumed by you in an
"insured contract", reasonable attorney fees and
necessary litigation expenses incurred by or for a
party other than an insured will be deemed to be
damages because of "bodily injury" or "property
damage", provided that:
 - (a) Liability to such party for, or for the cost
of, that party's defense has also been
assumed in the same “insured contract”; and
 - (b) Such attorney fees and litigation expenses
are for defense of that party against a civil

¹ The 2014/15 and 2015/16 Policies contain endorsement form CGD4580713 which modifies the second
sentence of the Expected Or Intended Exclusion as follow: “This exclusion does not apply to ‘bodily
injury’ or ‘property damage’ resulting from the use of reasonable force to protect persons or property.”

or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

CG 00 01 10 01, p. 2.²

SECTION V – DEFINITIONS

...

9. "Insured contract" means:

...

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement....

CG 00 01 10 01, p. 13.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

CG 00 01 12 04 p. 5.

SECTION V – DEFINITIONS

...

² The Contractual Liability Exclusion is modified by endorsement form CG D4 21 07 08 in the Policies in effect between November 1, 2012 and November 1, 2016. This endorsement does not modify the material terms of the Contractual Liability Exclusion with respect to this matter.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
- b. Your fulfilling the terms of the contract or agreement.

...

21. "Your Product":

- a. Means:
 - (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a) You;
 - (b) Others trading under your name; or
 - (c) A person or organization whose business or assets you have acquired; and
- b. Includes:
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
 - (2) The providing of or failure to provide warnings or instructions.

...

22. "Your work":

- a. Means:
 - (1) Work or operations performed by you or on your behalf; and
 - (2) Materials, parts or equipment furnished in connection with such work or operations.
- b. Includes:
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

- 1 (2) The providing of or failure to provide warnings or
2 instructions.

3 CG 00 01 10 01, p. 13, 15.

4 **k. Damage To Your Product**

5 “Property damage” to “your product” arising out of it or any part of it.

6 CG 00 01 10 01, p. 5.

7 **l. Damage To Your Work**

8 “Property damage” to “your work” arising out of it or any part of it
9 and included in the “products-completed operations hazard”.

10 This exclusion does not apply if the damaged work or the work out
11 of which the damage arises was performed on your behalf by a sub-
12 contractor.

13 CG 00 01 12 04, p. 5.

14 **j. Damage To Property**

15 "Property damage" to:

16 ...

- 17 (5) That particular part of real property on which you
18 or any contractors or subcontractors working
19 directly or indirectly on your behalf are performing
20 operations, if the “property damage” arises out of
21 those operations; or

- 22 (6) That particular part of any property that must be
23 restored, repaired or replaced because "your work"
was incorrectly performed on it.

...

Paragraph (6) of this exclusion does not apply to “property
damage” included in the “products completed operations
hazard”.

CG 00 01 10 01, p. 4-5.

SECTION V – DEFINITIONS

...

- 16.** "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

CG 00 01 10 01, p. 14.

n. Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property"

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

CG 00 01 10 01, p. 5.

4.6 The Policies contain the following language regarding other insurance:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all the other insurance by the method described in Paragraph **c.** below.

However, if you specifically agree in a written contract or written agreement that the insurance provided to an additional insured under this Coverage Part must apply on a primary basis, or a primary and non-contributory basis, this insurance is primary to other insurance that is available to such additional insured which covers such additional insured as a named insured, and we will not share with that other insurance, provided that:

a. The “bodily injury” or “property damage” for which coverage is sought occurs; and

b. The “personal injury” or “advertising injury” for which coverage is sought arises out of an offense committed

subsequent to the signing and execution of that contract or agreement by you.

b. Excess Insurance

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(a) That is Fire, Extended Coverage, Builder’s Risk, Installation Risk or similar coverage for “your work”;

(b) That is Fire insurance for premises rented to you or temporary occupied by you with permission of the owner;

(c) That is insurance purchased by you to cover your liability as a tenant for “property damage” to premises rented to you or temporarily occupied by you with permission of the owner; or

(d) If the loss arises out of the maintenance or use of aircraft, “autos” or watercraft to the extent no subject to Exclusion g. of Section I – Coverage A – Bodily Injury and Property Damage Liability.

(e) That is available to the insured when the insured is added as an additional insured under any other policy, including any umbrella or excess policy.

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any “suit” if any other insurer has a duty to defend the insured against that “suit”. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured’s rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer’s share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

CG 00 01 040 13 at p. 12, as modified by CG D0 37 04 05.

1 4.7 The Policies contain the following language regarding the insured's duties of
2 cooperation:

3 **2. Duties in the Event of Occurrence, Offense, Claim or Suit**

4 **a.** You must see to it that we are notified as soon as practicable
5 of an "occurrence" or an offense which may result in a
6 claim. To the extent possible, notice should include:

- 7 (1) How, when and where the "occurrence" or offense
8 took place;
9 (2) The names and addresses of any injured persons and
10 witnesses; and
11 (3) The nature and location of any injury or damage
12 arising out of the "occurrence" or offense.

13 **b.** If a claim is made or "suit" is brought against any insured,
14 you must:

- 15 (1) Immediately record the specifics of the claim or
16 "suit" and the date received; and
17 (2) Notify us as soon as practicable.
18 You must see to it that we receive written notice of the claim
19 or "suit" as soon as practicable.

20 **c.** You and any other involved insured must:

- 21 (1) Immediately send us copies of any demands,
22 notices, summonses or legal papers received in
23 connection with the claim or "suit";
 (2) Authorize us to obtain records and other
information;
 (3) Cooperate with us in the investigation or settlement
of the claim or defense against the "suit"; and
 (4) Assist us, upon our request, in the enforcement of
any right against any person or organization which
may be liable to the insured because of injury or
damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost,
voluntarily make a payment, assume any obligation, or incur
any expense, other than for first aid, without our consent.

CG 00 01 10 01, pp. 10-11.

1 4.8 The Policies also contain the following policy endorsement:

2 **AMENDMENT- NON CUMULATION OF EACH**
3 **OCCURRENCE LIMIT OF LIABILITY and NON**
4 **CUMULATION OF PERSONAL and ADVERTISING**
5 **INJURY LIMIT**

6 This endorsement modifies insurance provided under the following:

7 **COMMERCIAL GENERAL LIABILITY COVERAGE PART**

8 1. Paragraph 5 of SECTION III - LIMITS OF INSURANCE,
9 is amended to include the following:

10 Non cumulation of Each Occurrence Limit - If one
11 "occurrence" causes "bodily injury" and/or "property
12 damage" during the policy period and during the policy
13 period of one or more prior and/or future policies that
14 include a commercial general liability coverage part for the
insured issued by us or any affiliated insurance-company,
the amount we will pay is limited. This policy's Each
Occurrence Limit will be reduced by the amount of each
payment made by us and any affiliated insurance company
under the other policies because of such "occurrence".

...

15 CG D2 03 12 97.

16 4.9 In accordance with applicable law, Travelers now brings this claim for
17 Declaratory Judgment seeking a judicial determination that it does not owe any coverage
18 obligation to Northwest Pipe for the claims asserted in the Underlying Lawsuit.

19 **V. NO INDEMNITY OR DEFENSE COVERAGE UNDER THE POLICIES**

20 5.1 Travelers reasserts paragraphs 1.1 through 4.9 and incorporates the same as
21 though fully stated herein.

22 5.2 The Policies provide coverage only for "property damage" caused by an
23 "occurrence", as those terms are defined by the Policies, provided that any such "property
damage" occurs during the policy period and Northwest Pipe did not know, in whole or in part

1 about the alleged “property damage” prior to the inception of any applicable policy period.

2 5.3 There is an actual and justiciable controversy as to whether the claims against
3 Northwest Pipe involve claims for “property damage” as that term is defined.

4 5.4 There is an actual and justiciable controversy as to whether of the claims against
5 Northwest Pipe involve an “occurrence” as that term is defined by the Policies.

6 5.5 There is an actual and justiciable controversy as to whether the alleged liability of
7 Northwest Pipe is for “property damage” caused by any covered “occurrence.”

8 5.6 There is an actual and justiciable controversy as to whether any “property
9 damage” that was allegedly caused by a covered “occurrence” occurred during any policy period.

10 5.7 There is an actual and justiciable controversy as to whether Northwest Pipe had
11 knowledge, in whole or in part, of any alleged “property damage” prior to the inception of the
12 policy periods.

13 5.8 Pursuant to the Policies, coverage is excluded for “property damage” that is
14 expected or intended from the standpoint of the insured.

15 5.9 There is an actual and justiciable controversy as to whether Northwest Pipe
16 expected or intended any alleged “property damage”.

17 5.10 Pursuant to the Policies, coverage is excluded for property damage for which the
18 insured is obligated to pay damages by reason of the assumption of liability in a contract or
19 agreement.

20 5.11 There is an actual and justiciable controversy as to whether Northwest Pipe is
21 obligated to pay for any alleged “property damage” due to an assumption of liability in a contract
22 or agreement.

23 5.12 Pursuant to the Policies, coverage is precluded for “property damage” to

1 “impaired property” or other property that has not been physically injured arising out of a defect,
2 deficiency, inadequacy or dangerous condition in the insured’s product or the insured’s work.

3 5.13 There is an actual and justiciable controversy as to whether any alleged “property
4 damage” to any allegedly “impaired property” or other property that has not been physically
5 injured arises out of a defect, deficiency, inadequacy or other dangerous condition in Northwest
6 Pipe’s work or product.

7 5.14 Pursuant to the Policies, coverage is excluded for “property damage” to “impaired
8 property” or other property that has not been physically injured arising out of a delay or failure
9 by an insured or anyone acting on the insured’s behalf to perform a contract or agreement in
10 accordance with the terms of the contract or agreement.

11 5.15 There is an actual and justiciable controversy as to whether any alleged “property
12 damage” to any allegedly “impaired property” or other property that has not been physically
13 injured arises out of a delay caused by Northwest Pipe or a failure by Northwest Pipe to perform
14 a contract or agreement in accordance with the terms of the contract or agreement related to the
15 Project.

16 5.16 Pursuant to the Policies, coverage is excluded for liability for “property damage”
17 to the insured’s “your work”.

18 5.17 There is an actual and justiciable controversy as to whether the claims against
19 Northwest Pipe involve liability for “property damage” to Northwest Pipe’s work.

20 5.18 Pursuant to the Policies, coverage is excluded for liability for “property damage”
21 to the insured’s “your product”.

22 5.19 There is an actual and justiciable controversy as to whether the claims against
23 Northwest Pipe involve liability for “property damage” to Northwest Pipe’s product.

1 5.20 Pursuant to the Policies, coverage is excluded for liability arising from property
2 that must be restored, repaired, or replaced because the insured's work was incorrectly performed
3 on it prior to the completion of the insured's work.

4 5.21 There is an actual and justiciable controversy as to whether the claims against
5 Northwest Pipe involve liability arising from property that must be restored, repaired, or replaced
6 because Northwest Pipe's work was incorrectly performed on it prior to the completion of the
7 insured's work.

8 5.22 Pursuant to the Policies, coverage is excluded for liability for "property damage"
9 to that particular part of real property on which an insured or its contractors or subcontractors
10 worked directly or indirectly for the insured's operations if the "property damage" arose out of
11 those operations.

12 5.23 There is an actual and justiciable controversy as to whether the claims against
13 Northwest Pipe involve liability for "property damage" to that particular part of real property on
14 which Northwest Pipe, or its contractors or subcontractors, worked directly or indirectly for its
15 operations and if said "property damage" arose out of those operations.

16 5.24 Pursuant to the Policies, coverage is excluded for liability arising from damages
17 claimed for any loss, cost or expense incurred by Northwest Pipe or others for the loss of use,
18 withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of "your
19 product", "your work", or "impaired property" if such product, work, or property is withdrawn
20 or recalled from the market or from use by any person or organization because of a known or
21 suspected defect, deficiency, inadequacy or dangerous condition in it.

22 5.25 There is an actual and justiciable controversy as to whether the claims against
23 Northwest Pipe involve liability for damages claimed for any loss, cost or expense incurred for

1 the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or
2 disposal of “your product”, “your work”, or “impaired property” that has been withdrawn or
3 recalled from the market or from use by any person or organization because of a known or
4 suspected defect, deficiency, inadequacy or dangerous condition in it.

5 5.26 Pursuant to the Policies, to the extent that there is other valid and collectible
6 insurance available to the Northwest Pipe for purposes of the claims asserted in the Underlying
7 Lawsuit, the coverage provided under the applicable policy may be excess over such other
8 insurance.

9 5.27 To the extent that the Policies provide coverage, there is an actual and justiciable
10 controversy as to whether the coverage is excess over other insurance.

11 5.28 Pursuant to the non-cumulation provisions of the Policies, any payment by
12 Travelers under any policy for any “occurrence” will reduce the limit of each successive policy
13 issued by Travelers by the amount of any such payment for that “occurrence”.

14 5.29 To the extent that a progressive loss alleged, there is an actual and justiciable
15 controversy as to whether any potential coverage available under the Policies would limit
16 Travelers’ obligations to a single policy period.

17 5.30 Pursuant to the Policies, Northwest Pipe is required to comply with certain terms
18 and conditions as a condition precedent to coverage.

19 5.31 There is an actual and justiciable controversy as to whether Northwest Pipe
20 complied with the cooperation provisions in the Policies and whether any failure to comply on
21 the part of Northwest Pipe prejudiced Travelers.

22 5.32 Travelers reserves the right to assert any other exclusions or grounds for which
23 coverage for the claims against Northwest Pipe may be excluded under the Policies.

VI. CAUSE OF ACTION FOR DECLARATORY RELIEF

6.1 Travelers reasserts paragraphs 1.1 through 5.32 and incorporates the same as though fully set forth herein.

6.2 Actual and justiciable controversies exist as to whether any defense coverage is available to Northwest Pipe under the Policies as set forth above.

6.3 Pursuant to and in accordance with 28 U.S.C. § 2201, Travelers requests that the Court grant declaratory relief in favor of Phoenix and TPCC and enter a judicial determination that Phoenix and TPCC do not have an obligation to provide a defense to Northwest Pipe in regard to the claims related to the Underlying Lawsuit.

6.4 Actual and justiciable controversies exist as to whether any indemnity coverage is available to Northwest Pipe under the Policies in regard to the claims related to the Underlying Lawsuit.

6.5 Pursuant to and in accordance with 28 U.S.C. § 2201, Travelers requests that the Court grant declaratory relief in favor of Phoenix and TPCC and enter a judicial determination that Phoenix and TPCC do not have an obligation to provide any indemnity coverage to Northwest Pipe in regard to the claims arising from the Underlying Lawsuit.

6.6 To the extent that there is defense coverage available to Northwest Pipe under the Policies, there is an actual and justiciable controversy as to whether such coverage is primary or excess.

6.7 To the extent that the Court determines that there is coverage available to Northwest Pipe under the Policies, pursuant to 28 U.S.C. § 2201, Travelers requests that the Court grant declaratory relief in favor of Phoenix and TPCC and enter a judicial determination that such coverage is excess over any other coverage provided to Northwest Pipe under any other

1 policy of insurance.

2 **VII. PRAYER FOR RELIEF**

3 WHEREFORE, Travelers Property Casualty Company of America and The Phoenix
4 Insurance Company, having specifically alleged the foregoing, now pray for the following relief:

5 1. For a declaration of the rights and obligations of the parties hereto under the
6 Policies.

7 2. For a declaration that there is no duty to defend Northwest Pipe under the Policies.

8 3. For a declaration that there is no duty to indemnify Northwest Pipe under the
9 Policies.

10 4. For a judicial declaration that the District is bound by any judicial declarations in
11 this matter involving the Policies.

12 5. To the extent allowed by applicable law, for reimbursement of any and all defense
13 costs, fees, or expenses incurred by Phoenix and/or TPCC in defending any entity or person in
14 the Underlying Lawsuit who claims to be an insured under any of the Policies for which there is
15 no defense obligation.

16 6. For all pre-judgment and post-judgment interest as allowed by applicable law.

17 7. For attorney fees and costs allowed by applicable statute and law.

18 8. For other and further relief as the Court deems just and equitable.

1
2 DATED this 8th day of February, 2017.

3 LETHER & ASSOCIATES, PLLC

4 s/ Thomas Lether

5 s/ Eric Neal

6 Thomas Lether, WSBA #18089

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